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INTERNATIONAL LAW IN WAR.

INTERNATIONAL Law in War and the International Law of War are two distinct things, and the fact that they are not carefully enough distinguished has been the source in the present war of certain misunderstandings that are in no way unimportant.

The International Law of War, or to express it otherwise, International War Law, was, in its essentials, codified by the Hague Convention of 1907, to which for the law of sea war the Declarations of Paris, 1856, and of London, 1909, may be added. The latter is also mentioned here, although it was never ratified, because in the preamble is the explanation that: "The signatory Powers are united in the proposition that the following articles contain the rules which are substantially the generally recognized fundamentals of International Law." While it is true that for the International Law of War there exist technically arranged foundation principles concerning its meaning and validity which have in general a certain and clear outline, this is not the case with that problem which I suggest should be designated by the expression, "International Law in War." This deals rather with an unlimited series of questions of the most varied sort, answers to which do not exist in positive rules. General, methodic points of view may only be set up in individual cases—a situation which for the private-law jurist is quite as uncomfortable as for the lay jurist.

The importance which these questions have attained because of the present war has led me to prepare the following discussion.

What influence has the war as a whole and what influence have the individual circumstances of the war upon the validity and application of Positive International Law? That is the question.

Editor's Note.—The foregoing article by Prof. Dr. Th. Niemeyer, of the University of Kiel, Privy Counsellor, President of the German Branch of the International Law Association, was translated by Wendell Herbruck (LL.B., Michigan, 1909) American Exchange Teacher at the Royal Academy, Kiel.

The most important special question arising therefrom is that which inquires into the influence of the breaking out of war upon the treaties entered into by the belligerent parties.[1] In the modern literature of International Law it has often been answered that these treaties are extinguished with the exception of those made especially for the case of war.[2]

This school formula closes the mouth of the problem but does not satisfy it. The principal clause is not to be justified in itself nor does it correspond to the practice of nations. The exception sounds self-evident but is in reality not so and in the antithesis in which it is here placed is actually misleading.

The truth has been excellently formulated by BLUNTSCHI.[3] He says:

> "The efficiency of treaties is limited during war only in so far as they are incompatible with the prosecution of the war.
>
> "Those treaties that are to be applicable in case of war become effective only when war has once been declared."

These sentences earn the preference over the rule of the Institute (1912) because this latter is too involved, too casuistic and not elastic enough.

The word effectiveness is given an exact interpretation in this sentence (§ 461):

> "The effectiveness of treaties is for the most part interrupted and limited and certain of them must needs perish in war time, but not contracts as a whole."

The recent practice of the nations agrees with this. International Unions, as the International Postal Union, remain virtually in force, their operations being only in part and for the time being suspended. Disturbances of traffic through war, declarations of blockade, the practice of contrabanding and levying embargo are regarded as *vis major*. The modern practice is certainly very far from the old radical opinion which threw all treaties in time of war into the sort of invalidity which would accompany such agreements were there no law at all in the belligerent states.

Other agreements in newer fields of jurisprudence (such as protection to copyright, nationality, consular connections, etc.) are maintained in time of war in all countries with the here reported

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[1] Treated by the Institute for International Law 1912 in Christiania. Annuaire 1912, p. 611 et seq.

[2] For instance, Z. B. Fleischman in "Wörterbuch des Deutschen Staats und Verwaltungsrechts," vol. III, p. 516.

[3] Völkerrecht, vol. III, p. 516.

exception of England. At the present moment there is before a high court in Germany a case involving a question of the succession to the property of a Russian, in which the parties are a Russian presumptive heir and a German legatee. The decision must turn upon the construction of the agreements of the German-Russian Inheritance Convention of 1874, and the question of the invalidity of this agreement because of the present war has not even been suggested by either of the parties litigant.

Why the rules of International Law resting upon positive treaty engagements should be differently treated than if they were rules of international customary law[4] is not clear. The exterritorial position in International Law of an ambassador, which is based upon customary law, can not be treated differently from the extraterritorial nature of consuls in Turkey, which is based upon agreements between the states.

With the so-called lawmaking treaties the situation is somewhat different. On the one hand fundamental immunity from the influence of war is contained in them, but on the other hand the real or apparent exceptions to this immunity also appear from the very nature of war. If, moreover, France will "tear up the Peace of Frankfurt," and "cancel" the cession of Alsace-Lorraine, it would not mean that the Frankfurt treaty is extinguished by the outbreak of war, but merely that a political desire is proclaimed.

All of the attempts at general solutions through general casuistic formulas are beset with false or ambiguous premises, as is also the favored formula that war avoids all "political" treaties. It is true certain political treaties are avoided by war, but the idea "political" is, because of its uncertainty of meaning, altogether incapable of furnishing an acceptable solution.

When one speaks of treaties that are intended for the case of war one thinks first of those treaties which make up the laws of warfare, but along with these must be placed those agreements that stipulate for assistance in time of war or concern neutrality, as those, for instance, of June 24, 1831, April 19, 1839, concerning Belgium. One is quite right in insisting for those treaties made for the event of war that they are first called into operation by state of war arising, yet one dare not go further and attribute to them too high a degree of validity; one dare not say they are more fireproof because they are especially made to endure the fire of war. On the contrary, those agreements made for war stand in a most dangerous dependence upon the crisis in International Law which arises as

[4] Völkerrechtliche Gewohnheitsrecht.

every great war breaks out. They are immediately and seriously threatened by that ruling mistress of war: "the necessity of war,"[5] which sits in all such agreements hidden like a secret worm that suddenly grows to giant size and swallows the whole thing.

We have experienced that the neutrality of Belgium was made impossible by the Belgian-French, French-English and Belgian-English understandings and military measures that preceded the German "invasion," because the "necessity of war" demanded these measures and movements. And no one dare place blame upon these nations because they carried out a march through Belgium. *"Omnia licere in bello quae necessaria sunt ad finem belli"*[6]—this statement of the "necessity of war" covers the conduct of both sides. "Law is not that which has been abolished. Law is that which remains," is an old German saying.[7] The neutrality of Belgium has for a long time had no existence.[8] The game of hide and seek which European cabinets and military staffs played with Belgian neutrality was known to the whole world. Every one knew that, as well for France as for Germany the taking of Belgium for the purpose of attacking the other country was *"necessarium ad finem belli"*—and the quarrel is a laughable *"possessorium summarissimum"* that tries to decide who actually first broke the neutrality.

The limitation which the war puts upon the working of war treaties (if I may so designate them) and upon other agreements between states is upon principle the same. It reaches, as I have already indicated, the field of state contracts and beyond that affects the entire field of International Law. The execution of the rules of International Law is, as BLUNTSCHI says, limited in time of war.

That is true in an endless number and variety of respects. International Law assumes in time of war a special figure. Many do not recognize it in its new dress. But he who is familiar with the elastic nature of International Law in general and he who has not forgotten to look upon International Law, with Hugo GROTIUS, as having fundamentally a double body—peace and war law—will not expect anything else than an "International Law in War," that is subject to the real necessities of the war.

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[5] Kriegsraison.

[6] Hugo Grotius.

[7] "Recht ist nicht was verrückt ist. Recht ist was gilt."

[8] [The German government has not gone so far as this. The Chancellor has admitted a breach of neutrality by Germany, but justifies it upon the ground of necessity—the 'necessarium ad finem belli' of the author of this article.—Translator's note.]